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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1963

Case No. 931.

LYNCHBURG TRAFFIC BUREAU (Corp.)
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court For The Western District of Virginia.

REPLY BRIEF OF APPELLANT TO MOTION TO AFFIRM

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STATEMENT

It should be borne in mind that appellant is not concerned with the level of the rates as such on fine coal to Danville and Lynchburg, but rather appellant is here concerned with the relationship in the rates between Lynchburg and Danville. In other words, regardless of the scale or level of rates used at Danville, the rate to Lynchburg became unlawful when that rate is not at least 53 cents a ton less than the rate to Danville. The amount of the re-

lationship is 53 cents a ton which was the difference in the rate to Danville and the rate to Lynchburg on fine coal prior to the date the Danville rate was first reduced, in 1954. The record shows that appellant is seeking the restoration of the former relationship as it is stated in the record that:

> "The complainant seeks a rate on fine coal from the base group to Lynchburg of $3.07 or 53 cents lower than the rate on the same commodity to Danville." (Jur. S. p. 35)

The 53 cents figure is the difference between the rate on fine coal to Danville of $4.35 and to Lynchburg of $3.82 per ton in effect at the time the reduction was made to Danville (Jur. S. p. 35). The aforesaid difference was fixed by the Commission when it prescribed a rate of 205 cents per ton to Lynchburg in *Ashland Coal and Ice* v. *A.C.L.*, 256 I.C.C. 429, and prescribed a rate of 255 cents a ton to Danville in *Danville Chamber of Commerce* v. *Southern Railway*, 191 I.C.C. 20 (Jur. S. p. 5). Since Lynchburg, for over 60 years, has been lawfully, in accordance with various decisions of the Commission, entitled to a lower rate than Danville, it is unlawful to charge a rate at Lynchburg on fine coal which is not 53 cents a ton less than the rate to Danville, regardless of the level of the rate to Danville or the cause for the establishment of the reduced rates to Danville. The cause for the reduced rate to Danville may or may not be to meet competition with other fuels but the fact remains that a disturbance of the rate relationship between Danville and Lynchburg, which has existed for 60 years, will do irreparable damage to Lynchburg and place Danville in a better competitive position, a competitive position its geographical location does not entitle Danville to enjoy over Lynchburg.

The Commission has concerned itself with the alleged right of appellee carriers to fix their own rates to meet competition and the inability of the Commission to do anything about it. The main issue here and before the Commission is not the level of the rate themselves, but rather the lawfulness of destroying the rate relationship between Danville and Lynchburg.

The Commission, in dealing with the relationship in rates, stated:

> "While the Lynchburg rate and the distance for which it applied were considered by the Commission in prescribing the rate to Danville, no specific relationship between bituminous coal rates to Lynchburg and to Danville was prescribed or required by the Commission in the Carolina Coal Consumer's Case supra, nor has any specific relationship in the rates on either fine or lump coal to Lynchburg and Danville been prescribed in any other proceeding." (Jur. S. 43-44)

This conclusion of the relationship by the Commission is incorrect in fact, even though it may or may not be technically correct, as the Commission actually prescribed a rate of 50 cents less on fine coal to Lynchburg than the rate on fine coal prescribed to Danville. The difference of 50 cents in the rate to Danville and Lynchburg was actually prescribed regardless of the name by which the difference is called. (Jur. S. p. 5). See *Ashland Case supra*, 256 I.C.C. 429, and *Carolina Case*, 270 I.C.C. 291.

The relationship was actually prescribed in and the difference in the prescribed rates to Lynchburg and Danville was again affirmed in *Carolina Coal Consumers Con-*

ference v. *A. & R.*, 270 I.C.C. 291, when the Commission said:

> "Upon consideration of the traffic and transportation conditions in the respective areas (which includes Lynchburg) and of the needs of shippers and consumers concerned, as well as the revenue needs of the carriers, we are convinced that the difference in the rate levels referred to (including the rate level to Lynchburg, page 318) IS TOO GREAT AND THAT A REDUCTION IN THE ASSAILED RATES GENERALLY TO THE EASTERN AND western portions of the Carolinas; to Augusta area, and to Danville and Riddle, is warranted." (Jur. S. p. 12). (Emphasis added)

The report of the Commission in the Carolina Case supra shows that a different rate at Lynchburg from the rate to Danville is justified based on the transportation conditions in the respective areas (Lynchburg and Danville), the needs of the shippers as well as the revenue needs of carriers. Therefore the same rate at Lynchburg as at Danville is discriminatory against Lynchburg as well as being unjust and unreasonable. This showing of appellant establishes the fact that undue preference exists at Danville and unjust discrimination exists at Lynchburg. The above showing establishes the existence of discrimination when measured by the decision of the Supreme Court in *New York* v. *United States*, 331 U.S. 284 where at page 365 the Court stated the following:

> "Hence we must determine from the preexisting law whether a discrimination against a territory is obnoxious to Section 3. The rule is stated in *United States* v.

Illinois R., supra, (263 U.S., p. 524, 68 L. Ed. 425, 44 S. Ct. 189), as follows:

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.'"

The above decision of this Court clearly shows that competition between fine coal and natural gas at Danville is no grounds for the establishment of discriminatory rates at Lynchburg or the destruction of a relationship in rates between Lynchburg and Danville that has existed for over 60 years. The same rate at Lynchburg and Danville is not justified by the cost of the respective services, by their value or by other transportation conditions.

The reply will show that there is no merit to the motion to affirm.

RATE AGAINST PARITY

There is nothing in the Interstate Commerce Act, as amended, that affords the sligltest warrant for the decision of the Commission holding that Lynchburg and Danville must be treated legally identical as to rates on fine coal, but there is a definite prohibition in the Interstate Commerce Act against such rates being equal. The Commission has, for over 60 years in performing its duties under the Act, recognized that different rates at Lynchburg and Danville are justified and that such difference in rates are justified

by the differences in distances, the transportation conditions, and cost of rendering services to Lynchburg and to Danville. (See *City of Danville* v. *Southern Railway* 8 I.C.C. 409 (decided 1900) and 34 I.C.C. 430; Bituminous Coal to southeast 37 I.C.C. 652; and other decisions reported at 256 I.C.C. 429; 270 I.C.C. 291, 191 I.C.C. 20; 213 I.C.C. 101; 190 I.C.C. 325 and 190 I.C.C. 302.) In each of these decisions the Commission fixed a difference in the rates to Lynchburg from the rates it fixed to Danville and in so doing recognized the fact that Lynchburg is lawfully entitled to a lower rate than Danville.

In the City of Danville case 8 I.C.C. 409 and the *City of Danville case* 34 I.C.C. 430, the allegation was that the rates on coal then in effect caused unjust discrimination against Danville and undue preference to Lynchburg. The discrimination and preference was found to exist by the Commission and the Commission removed the discrimination by prescribing reasonable, just and otherwise lawful rates to Danville and in so doing fixed a higher rate at Danville than the rate applicable at Lynchburg. This prescribed parity in rates between Lynchburg and Danville on coal continued in effect from 1900 to 1954 on which date the appellee carriers began destroying the parity. Consequently, finding the rate to Danville not shown unlawful when applied at Lynchburg creates discrimination against Lynchburg and establishes preferential rates at Danville which discrimination is prohibited by law and defeats the purpose for which the Commission was created—to prevent the creation of DISCRIMINATION. The Commission and the carriers contend that these unlawful rates are justified by competition at Danville between fine coal and natural gas.

The former decisions of the Commission finding that different rates should apply on coal to Lynchburg and Danville

establishes, as a fact, that the rate applicable to Danville when applied at Lynchburg is unlawful at Lynchburg.

In fact the Commission so found that Lynchburg is entitled to lower class rates than Danville and this Court sustained the Commission in Class Rate Investigation 1939, 262 I.C.C. 447 (pp. 619, 610) (331 U.S. 284) where the Commission stated that:

> "Nearness to markets and ability to ship to markets, on a basis fairly and reasonably related to the rates of competitors, are nevertheless potent factors, in the location of a manufacturing plant. IN FACT, RATE RELATIONS ARE MORE IMPORTANT TO THE MANUFACTURER AND SHIPPER THAN THE LEVELS OF THE RATES." (Emphasis added)

In the decision of the Commission in Class Rate Investigation 262 I.C.C. 447 the Commission prescribed a class rate of 4 cents a 100 pounds or 80 cents a ton less to Lynchburg than to Danville from the origin here involved which class rate would apply on coal in the absence of a commodity rate on coal. (Jur. S. p. 37). The Supreme Court in *New York* v. *U.S.*, 331 U.S. 284 affirmed the decision of the Commission in 262 I.C.C. 447. Hence, the Danville rate when applied at Lynchburg results in unlawful rates at Lynchburg based on the decisions of the Commission prescribing rates on coal to Danville and Lynchburg and based on the decision of the Commission in the Class Rate case 262 I.C.C. 447 which rates were affirmed by this Court.

The Danville rates on fine coal when applied at Lynchburg destroys the parity in rates between Danville and Lynch-

burg which the Interstate Commerce Commission fixed over 60 years ago and the destruction of the parity is sought to be made upon an unsupported claim that there is competition at Danville between fine coal and natural gas. The alleged competition at Danville is not shown in the record. There is a substantial question involved in this case which warrants the overruling of the Motion to Affirm and the taking of jurisdiction by this Court.

DISCRIMINATION

The record shows that Lynchburg and each point used in the comparisons have Chambers of Commerce which compete with one another in efforts to attract new and retaining existing industries, that each such City requires just, reasonable, and otherwise lawful rates on a basic raw material such as fine coal to permit its development and growth, that Lynchburg by reason of its relatively higher rates, distance considered is in an unfavorable competitive position compared with Danville, Winston Salem, Greensboro and Durham (Jur. S. p. 38).

In answer to the positive evidence of appellant showing that each point named are competitive, the Commission answered by saying that:

> "Complainant has failed to show that there is competition between CONSUMERS OF FINE COAL AT LYNCHBURG AND CONSUMERS OF FINE COAL AT DANVILLE, or that the rate adjustment has operated to the disadvantage of the COMPLAINANT or ANY RECEIVER OF COAL THERE LOCATED. On the other hand, the defendants have shown without contradiction, that the present rates

> on fine coal to Danville are compelled by gas competition, and that this competitive factor is not compelling at Lynchburg" (Jur. S. pp. 45, 46). (Emphasis added)

The record fails to show that the reductions to Danville were made to meet competition between fine coal and natural gas (Jur. S. pp. 40 and 41) and the said report of the Commission is contrary to facts of record.

The decision of the Commission required appellant to show that there is competition between CONSUMERS OF FINE COAL AT LYNCHBURG AND CONSUMERS OF FINE COAL AT DANVILLE and for that reason, the failure to so show the complaint was dismissed. The dismissal of the complaint on that ground is contrary to a decision of this Honorable Court holding that:

> "An unlawful discrimination against regions or territories in the matter of freight rates charged IS NOT DEPENDENT ON A SHOWING OF UNLAWFUL DISCRIMINATION AGAINST INDIVIDUAL SHIPPERS, since the effect of discriminatory rates is not only to impede established industries but to prevent the establishment of new ones, to arrest the development of a state or region; and to make it difficult for an agricultural economy to evolve into an industrial one." State of New York v. U.S. 67 S. Ct. 1207, 331 U.S. 284, 91 L. Ed. 1492. (Emphasis added)

The record shows that the evidence of appellant before the Commission met the required proof to establish discrimination as set forth in *New York* v. *U.S.*, 331 U.S. 284 (See Jur. S. p. 38). THE PROOF OF APPELLANT RELATED TO SHOWING THE DISCRIMINATION

AGAINST LYNCHBURG AND THIS COMMUNITY RATHER THAN DISCRIMINATION AGAINST INDIVIDUAL RECEIVERS OF COAL. No actual receiver of coal was named in the complaint.

A LICENSE

The appellee, United States and the Interstate Commerce Commission, contends that:

> "The need to adjust rates to meet competition has long been a recognized factor in determining the reasonableness of rates under Section 1(5)." (Their Motion p. 7)

The appellee rail carriers contends that:

> "The rail carriers, in order to retain this important traffic, frequently find it desirable to reduce their rates on fine coal to a level below those applicable on lump coal in circumstances where the industrial users of fine coal are in a position to substitute the use of oil or natural gas." (Their Motion p. 3)

Then the Commission stated that:

> "Under Section 1 of the Act, the railroads are entitled to publish and charge reasonable, maximum rates. So long as the railroads do not go below the minimum limit of reasonableness, they may voluntarily publish rates which do not attain the maximum, but the Commission cannot, under Section 1 alone, require them to do this." (Jur. S. p. 43)

This conclusion of appellees is contrary to the holding of this Court that:

> "Proposed interstate rates may be within the zone of reasonableness and yet result in undue prejudice or otherwise violate this title." (49 U.S.C. 1 and 3) *Interstate Commerce Commission* v. *Inland Waterways Corp.*, Ill. 1943, 63 S. Ct. 1296, 319 U.S. 671, 87 L. Ed. 1655.

Furthermore, this Honorable Court has held that:

> "The Interstate Commerce Commission may remove a discrimination effected by rates charged by railroads even when they are within the zone of reasonableness, if the discrimination is forbidden by this paragraph." (49 U.S.C. 3) *State of New York* v. *U.S.*, 331 U.S. 284.

It is clear from the above that the decision of the Commission in this proceeding is contrary to decisions of this Court holding that the Commission may remove unlawful rates even though they fall within a zone of reasonableness.

One of the inconsistencies is that the Commission held that the rate applicable to Danville is not shown to be unjust or unreasonable or otherwise unlawful when applied at Lynchburg. This holding is violative of Section 4 of Title 49 U.S.C. as the appellee carriers cannot charge more at Lynchburg than at Danville until they obtain relief from the Interstate Commerce Commission authorizing the carriers to depart from the provisions of Section 4 of the Act. No such authorization was granted. Therefore, charging the Danville rate at Lynchburg is contrary to Section 5 which provides that it:

> "Shall not be construed as authorizing any common carrier within the terms of this part to charge or receive as great compensation for a shorter as for a longer distance."

Consequently, there is no sanction in law for the action of the Commission in finding that the assailed rates are not shown to be unjust, unreasonable, unjustly discriminatory, unduly prejudicial, or violative of Section 4 of the Act, when, as here, the assailed rate is unlawful under Section 4 of the Act.

The decision of the Commission holding that APPELLEE CARRIERS ARE AT LIBERTY to adjust their rates so long as the railroad does not go below the minimum limit or reasonableness or attain the maximum and that the Commission cannot under Section 1 alone require them to do this, is a holding contrary to Sections 3 and 4 of the Act as well as repugnant to Section 1 of the Act.

This decision gives the rail carriers a license to violate the Act with impunity at their pleasure. The Interstate Commerce Act does not give the Commission the authority to license a rail carrier to build up one community with favorable rates and destroy another community by unfavorable rates. Consequently, the appeal presents substantial question for determination by this Honorable Court.

COMPETITION

A finding that competition exists at Danville between fine coal and natural gas is a finding of competition that does not exist, based on the record. Consequently, such a finding by the Commission presents a substantial question requiring action by this Honorable Court.

The appellees, United States and the Interstate Commerce Commission, at sheet 7 of their Motion, state:

> "Indeed, the Commission found that the railroads were justified in lowering their rate for shipments of fine coal to Danville below the maximum because of the competition at Danville between said coal and natural gas, a competition which did not exist at Lynchburg."
>
> Does the record actually support appellees in their contention that the reduction at Danville was made to meet actual competition at Danville between fine coal and natural gas? The record does not support such a finding and the Motion to Affirm must be overruled.

The record before the Commission shows by a witness for defendant carriers that the FIRST REDUCTION TO DANVILLE was made in 1954 to SATISFY THE PROVISIONS OF SECTION 4 OF TITLE 49 U.S.C. AS DEFENDANT CARRIERS HAD REDUCED THE RATE TO points in North Carolina which resulted in higher rates at Danville than at points in North Carolina and the reduction at Danville was made to remove fourth section departures, Jur. S. p. 40. The SECOND REDUCTION at Danville was NOT MADE for competitive reasons, BUT BECAUSE THE SOUTHERN RAILWAY REDUCED THE RATE TO DANVILLE FROM CERTAIN MINES ON THE INTERSTATE RAILROAD. The reductions these carriers made on July 10, 1958 to points in North Carolina were not made applicable at Danville as Fourth Section Order No. 18957 issued on July 9, 1958 authorizing the appellee carriers to charge more at Danville than at a more distant North Carolina point (Jur. S. p. 41). It is significant to observe that if the reduction in 1958 to Danville was made as contended by appellee, to meet

competition between fine coal and natural gas at Danville, then it was not necesary to obtain Fourth Section relief, as was done in order to charge the former rate at Danville. The third reduction was made on April 29, 1959 by all the carriers to all points in southern Virginia and North Carolina (Jur. S. p. 41). The reduction to Danville was not made to meet competition between fine coal and natural gas.

The record before the Commission does not sustain the Commission or the rail carriers that competition at Danville between fine coal and natural gas required the establishment of the reduced rates on coal. The report of the Commission is therefore unsupported by substantial evidence and that fact presents a substantial question requiring action by this Court.

CONCLUSION

The fact, if it was true which it is not, that there is competition at Danville between fine coal and natural gas, still that competition does not give the appellee carriers the right to establish rates which do irreparable damage to Lynchburg nor does the Interstate Commerce Act authorize the Commission to permit discriminatory rates to continue in effect. The record, since 1900, shows that Danville and Lynchburg are in competition with each other and, due to that competition, the Commission has prescribed different rates on coal to Lynchburg and Danville. The difference in the rates was 53 cents a ton at the time the preferential rates were published to Danville. Consequently, a disturbance of that relationship is the creation of unlawful rates at Lynchburg. When the rate to Danville was made applicable at Lynchburg and when a higher rate at Lynchburg than at Danville was in effect, the rate to Lynchburg became

discriminatory at Lynchburg, under prior findings of unreasonableness, became entitled to a rate of 53 cents a ton less than the rate to Danville.

The relief here sought should be granted and the motion to affirm should be overruled. Appellant so prays.

Respectfully submitted,

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May 7, 1964

PROOF OF SERVICE

I, W. G. Burnette, attorney for Appellant, hereby certify that I have this 6 day of May, 1964, served a copy of the foregoing document upon the Appellees by mailing a copy thereof to:

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